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Censorship

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**CENSORSHIP: THE FILMS, VIDEOS, AND
PUBLICATIONS CLASSIFICATION ACT 1993 - THE
BALANCING ACT**

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I ABSTRACT AND WORD LENGTH

A *Abstract*

This paper analyses the balance of liberal, feminist, and conservative interests that underlies the Films, Videos, and Publications Classification Act 1993 by exploring the balance between harm and offence that exists in the Act. In doing so, this paper cites case law to show that because a causal relationship between harm and material perceived to be harmful cannot be proved, community standards of tolerance are required to gauge harm. This paper concludes that the principle provides the basis within a rationale of harm for censoring publications which subordinate women, and also provides a basis for more censorship rather than less censorship.

This paper also explores the limited relationship that exists between the Act and the Broadcasting Act 1989 (which reflects conservative interests) and concludes that in the interests of consistency there is scope for some rationalisation of that relationship.

This paper also explores the balance that exists in the Act between freedom of expression and freedom from harm using a New Zealand Bill of Rights Act 1990 analysis and concludes that that the influence of that Act on the Films, Videos, and Publications Classification Act 1993 is likely to be limited and therefore will not have a liberalising effect on the Act, ie will not lead to less censorship.

B *Statement on Word Length*

The text of this paper (excluding contents page, footnotes, bibliography, and appendix) comprises approximately 15,000 words.

II CONCLUSIONS

1. The Act can be analysed in terms of the balance between harm and offence. The basis of the Act is on avoiding harm, (which imposes less censorship than if it were based on offence) whereas other aspects of censorship in New Zealand tend to focus on offence. The Act is the result of much public consultation and imposes the level of censorship that the public wants.
2. The focus of the Act is on the status of a publication and this is a possible factor in the symbolism associated with censorship of publications and a reason for the imposition of less censorship.
3. Harm appears to be a sound test because it requires censors to focus on the least amount of censorship and this is consistent with democratic principles. The test has been used in New Zealand since 1963, is able to accommodate changing standards, and is supported by recent Canadian case law. It avoids definitions of pornography and in doing so requires a judgment about the publication to be made. It avoids the debate about whether pornography and such material is a symptom or a cause of a social problem. It is unlikely that this test will be changed.
4. Standards against which to gauge harm are required because harm cannot be proved. This link between harm, standards and proof is stated in Canadian case law and applies when interpreting the Act. The principle is able to accommodate liberal concerns (based on harm) and feminist concerns (based on the subordination of women with its difficulty of proving subordination and effect on attitudes towards women). It provides a basis from which the new terms in the Act ("degrading", "dehumanising" and "demeaning") can be interpreted. It can accommodate pornography and other kinds of material perceived to be harmful. It provides a rationale within the harm principle for more censorship rather than less censorship.

The accommodation of feminist concerns has come about in a context of the availability of harder pornography due to technology, and in the context of women's changing role in society.

5. Standards are of tolerance (not taste), are contemporary and are those of the average New Zealander who cares. The Act through its two tier structure specifies what the community currently perceives to be harmful. Changing standards could lead to future amendment to some extent.
6. Display of publications is new and is based on offence but the Act follows its focus on harm through to display in that such publications must first be classified as harmful to the community if made available to persons outside of a restricted class (such as children) before they can be considered offensive for the purposes of display. Two purposes of display conditions are therefore protection and avoidance of offence.
7. Any major change to the Act will likely come from legislative methods adopted to regulate new technology coupled with the perceptions of the community of the harm arising from that technology.

The Broadcasting Act 1989 and the Films, Videos, and Publications Classification Act 1993 have different tests yet often have to deal with similar issues. There is scope for the two to be rationalised.

8. The Act can also be analysed in terms of the balance between freedom of expression and freedom from harm using a New Zealand Bill of Rights Act 1990 analysis. However the New Zealand Bill of Rights Act 1990 is unlikely to overturn classification decisions that are based on the statutory criteria. In other words, it is unlikely that its effect will be to impose a more liberal interpretation on the Act.

However, the views of the United Nations Human Rights Committee may be persuasive in changing the Act itself, ie in changing the possession offence.

9. Overall, the Act is a mix of liberalism, conservatism, and feminism. It is liberal in that explicit sex *per se* between adults intended to sexually arouse is not banned, publications may contain some elements that fall short of harm, children as in previous legislation are attempted to be protected with restricted classifications, offence from display is attempted to be avoided, and there is provision for consumer advice in relations to films and videos. It is conservative in that certain material is banned outright and proof is not required. It is feminist in that feminist concerns are recognised and proof is not required.
10. Censorship issues in New Zealand bear a significant similarity to censorship issues in jurisdictions similar to New Zealand. How they are dealt with in those jurisdictions influence how they are dealt with in New Zealand.

III BACKGROUND

A *Philosophical views*

The Report of the Ministerial Committee of Inquiry which preceded the Films, Videos, and Publications Classification Act 1993 (the Act)¹ saw merit in each of the three views of liberalism (tolerance for diversity), conservatism (dignity and values), and feminism (empowerment and equality).

1 *Liberalism*

The Committee outlined the liberal view as freedom of individuals to act within the open marketplace of ideas as being the best way to truth and wisdom. Balanced against this was the view of J. S. Mill who argued that "the only purpose for which power can rightfully be exercised over any member of a civilised community against his will, is to prevent harm to others."²

However, the Committee noted that in the twentieth century, truth will not necessarily rise above untruth in an environment in which the need to make a profit rules and further noted:³

Such considerations do not invalidate the central tenets of liberal faith but they do help to modify its application. Thus most liberals now accept that the law may be used to see that the marketing of pornography does not cause involuntary offence to the public; that it may be used to protect children; and that it may be used through classification to give education and consumer advice to the public.....Beyond this,

¹ *Report of the Ministerial Committee of Inquiry into Pornography* (January 1989) otherwise known as the *Morris Report*, 55-61.

² As quoted in the *Morris Report* (January 1989) 18.

³ See n 1, 56.

liberals require that any demonstration sufficient to constrain freedom must rest on empirical evidence and statistical probability.

2 *Conservatism*

The Committee outlined the conservative view as moral values (being those which express the accumulated wisdom of the majority and which have stood the test of time) being embodied in the law, otherwise society will disintegrate.

The Committee noted:⁴

Conservatives believe that the State may properly act to prevent personal immorality when it offends the sense of decency of the majority. In this the law has a symbolic function of setting the limits of tolerance by proscribing what is unacceptable to common morality.

Conservatives believe that both children and adults need protection.

3 *Feminism*

The Committee outlined this in relation to pornography as perpetuating inequalities between the sexes by portraying men's power over women.

The Committee noted:⁵

The emphasis on men's vision of women as defining how women are in a society where men have control brings this feminist analysis to define the harm of pornography differently from liberals. The latter see pornography as acceptable unless giving rise to considerable harm, such as leading men to commit sex crimes. The feminist perspective sees pornography as harming women both indirectly, through male behaviour, and directly, through its pervasive definition of how women are sexually,

⁴ See n 1, 56.

⁵ See n 1, 58.

The Committee followed the Fraser Committee (in Canada) in enunciating principles which are common to all viewpoints and acknowledged that these may sometimes conflict. These principles are: Equality, individual responsibility, individual freedom, human dignity, and appreciation of sexuality (ie acknowledging the need for tolerance and openness in sexual matters).

This paper shows how the Act accommodates all 3 viewpoints.

B Purpose of the Act

The Act has a number of purposes which include:

- Creating one test for all publications.
- Specifying what should be banned and what should be scrutinised.
- Addressing concerns of how women are portrayed in pornography.
- Enacting display provisions.

1 One test

Prior to the enactment of the Films, Videos, and Publications Classification Act 1993 there were separate Acts that created separate structures and tests for censoring films, videos and other publications. The Act was enacted so as to have one structure and one test for all publications (as defined)⁶ whatever their medium. Apparently, this one structure system is a world first.⁷

⁶ See the Appendix for the definition of "Publication".

Separate structures and tests arose because of the development of films and videos, separate from each other and separate from printed publications.

⁷ NZPD, vol 532, 12757-12779, 2 December 1992, 12768.

⁸ Cen.
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childr

⁹ Sect
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¹⁰ Sec

The preamble to the Act states that it is an Act to consolidate and amend the law relating to the censoring of publications. It repeals previous legislation. Some aspects of the previous legal tests have been incorporated in the new test of "objectionable" and therefore many of the cases decided under the previous legislation will still be useful. Case law decided under the now repealed legislation comprises some High Court and Court of Appeal decisions, and all of the decisions of the Indecent Publications Tribunal. The Tribunal's function was to censor magazines and books and it published all of its decisions. As at September 1995 there had been no cases on the new Act.

The overriding test is contained in section 3(1). A publication is "objectionable" if it deals with matters such as "sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good".

Prima facie this test reflects liberal interests in that the test is saying that people can view whatever publications they like so long as those publications do not harm society.

2 *Specifying what should be banned and what scrutinised*

The Act was also an opportunity for the State to clearly define what kinds of material should be banned and what should be scrutinised.⁸ The Act does this through section 3 by banning publications which support or promote certain kinds of activity⁹ and by requiring publications which deal with certain kinds of activity to be given close scrutiny.¹⁰ By restricting or banning the depictions described in the Act,

⁸ *Censorship and Pornography Proposals for Legislation*, Minister of Justice (October 1990), 10 where it was said: "Many people take strong issue with material which deals with the sexual exploitation of children or which portrays women in a very degrading manner."

⁹ Section 3(2) Films, Videos, and Publications Classification Act 1993. See the Appendix to this paper for the full text of section 3.

¹⁰ Section 3(3) Film, Videos, and Publications Classification Act 1993.

the State is seen to be upholding the principles endorsed by the Committee of Inquiry into Pornography and which are common to the three viewpoints of liberalism, conservatism, and feminism. The depictions reflect what the community perceives to be harmful.

3 *Concerns about how women are portrayed in pornography*

As well as creating one structure and one test, the Act was also an opportunity to address concerns as to how women are portrayed in pornography, ie to address what are commonly known as feminist concerns. There are standard themes in pornography which have the effect of degrading women. These themes include:

- Women always being sexually available.
- Women being sexually insatiable.
- Women enjoying abuse.
- Women being depicted as sexual objects.
- Women being humiliated or abused.
- Women's sole purpose being to sexually satisfy men.
- Women being presented in positions of sexual submission.
- Women being responsible for male sexual behaviour.

These concerns are addressed by censors having to give weight to the extent and degree to which, and the manner in which a publication deals with conduct of a "degrading or dehumanising or demeaning nature", or "degrades or dehumanises or demeans any person"¹¹ subject to the overriding test of availability of the publication being likely to be injurious to the public good.

¹¹ Section 3(3)(a)(iii) and (3)(c) Films, Videos, and Publications Classification Act 1993.

4 *Display conditions*

In addition, the Act has new conditions on the display of restricted material.¹²

There were no display conditions under the previous legislation.

Section 27 of the Act which contains display conditions relating to publications has an overriding test of the likelihood of offence to reasonable members of the public. This is in line with modern liberal thinking that the marketing of material such as pornographic material should not cause offence and appears to be one point where liberal and conservative thinking merges.

The test of offence to reasonable members of the public contrasts with the test of availability being injurious to the public good. Display conditions enable availability to be restricted in a practical way and so support the injury to the public good test. They enable publications classified as objectionable unless restricted to certain persons to be displayed in a manner that restricts them to those persons and they enable consumer advice to be noted on the publication. Display conditions are aimed at avoiding offence caused to reasonable members of the public by the marketing of certain publications

C *Act Covers More than Pornography*

When the Bill was being debated in Parliament, there was much emphasis on it being used to censor pornography. The Ministerial Committee of Inquiry had "pornography" in its title. However, the Act deals with more than matters of sex. It

¹² It is likely that some decisions of the Office of Film and Literature Classification relating to the display of publications in sealed opaque packaging will be reviewed by the Film and Literature Board of Review. Before the Act, sealing was done voluntarily at the request of the Indecent Publications Tribunal and opaque packaging was not requested.

deals with "matters such as sex, horror, crime, cruelty, or violence in such a manner as the availability of the publication is likely to be injurious to the public good." It does not *include* such matters and therefore the matters that can be dealt with are limited to matters related to the matters stated. Therefore the Act is not intended to suppress such matters as political,¹³ religious or military expression. However, weight must be given to the extent and degree to which, and the manner in which the publication promotes or encourages criminal acts or acts of terrorism.¹⁴

D *Government Publications Relating to the Act*

The *Report of the Ministerial Committee of Inquiry into Pornography*¹⁵ was followed by a paper released by the Minister of Justice, *Censorship and Pornography Proposals for Legislation*.¹⁶ As part of the Select Committee process, the Justice Department prepared a report¹⁷ summarising the submissions made to the Select Committee. The Report of the Select Committee¹⁸ contains a summary of what the Bill did not cover. The Bill was introduced into the House on 2 December 1992.¹⁹ It came into force on 1 October 1994.^{20 21}

¹³ "Films continued to be censored for political reasons well into the 1960's." P Christoffel *Censored - a Short History of Censorship in New Zealand* (Monograph Series No. 12, Research Unit, Department of Internal Affairs, Wellington, 1989) 18.

¹⁴ See section 3(3)(e) Films, Videos, and Publications Classification Act 1993.

¹⁵ See n 1.

¹⁶ See n 8.

¹⁷ *Report of the Department of Justice* (DJ/3), 24 May 1993.

¹⁸ *Report of the Internal Affairs and Local Government Committee on the Films, Videos, and Publications Classification Bill* (1.7A).

¹⁹ NZPD, vol 532, 12757-12779, 2 December 1992.

²⁰ The Films, Videos, and Publications Classification Act Commencement Order 1994 (1994/188).

²¹ The development of the Act by the Justice Department has been the subject of intensive consideration judging by the paper it has generated. Policy considerations prior to the development of the Bill generated

E Freedom of Expression

The Act restricts freedom of expression and so has human rights implications.²²

1 International obligations

New Zealand has various international obligations and should take into account the views of the bodies which monitor those obligations. In particular, New Zealand is a party to the International Covenant on Civil and Political Rights²³ (the Covenant).

2 New Zealand Bill of Rights Act 1990

The New Zealand Bill of Rights Act 1990 (the NZ Bill of Rights Act) was enacted to affirm New Zealand's commitment to the Covenant.²⁴ Section 3 of the NZ Bill of Rights Act 1990 applies the NZ Bill of Rights Act to acts done by any body performing a public function imposed on that body by law.²⁵ The NZ Bill of Rights Act (and relevant case law) therefore applies to the Office of Film and Literature Classification (established under the Films, Videos, and Publications Classification

8 files. The development of the Bill generated 11 files. The Select Committee process generated 3 boxes of files (274 submissions). The Act is continuing to generate files within the Justice Department.

²² This is the likely reason for the Act being administered in the Justice Department and not the Department of Internal Affairs.

²³ NZTS 1978, No. 19. In force in New Zealand 28 March 1979.

²⁴ The New Zealand Bill of Rights Act 1990, preamble.

²⁵ For example, see *Re Penthouse (US) Vol 19, No 5 and others* [1990-92] 1 NZBORR 429 which held that the decisions of the Indecent Publications Tribunal were subject to the New Zealand Bill of Rights Act 1990.

Act 1993 to classify publications) and to the Broadcasting Standards Authority (established under the Broadcasting Act 1989).

3 *Canadian case law*

Article 1 of the Canadian Charter of Rights and Freedoms²⁶ has similar wording to section 5 of the NZ Bill of Rights Act, and the Canadian cases on the Charter on censorship are directly relevant in interpreting the Films, Videos, and Publications Classification Act 1993 in relation to the NZ Bill of Rights Act. The leading relevant Canadian censorship case is the Supreme Court case of *R v Butler*.²⁷

²⁶ Canada Act 1982 (Can), sch B, The Revised Statutes of Canada, 1985 Appendices, Appendix II, No 44 (Queens Printer for Canada, Ottawa, 1985).

²⁷ (1992) 89 DLR (4th) 449.

IV THE BALANCE BETWEEN HARM AND OFFENCE

A *The Act is one Part of Censorship in New Zealand*

1 *Marketplace censorship*

Self censorship imposed by providers of goods and services (as opposed to censorship by the State) due to marketplace demand and which has an offence (ie a moral) basis is seen in many areas in New Zealand such as in libraries, education, bookshops, and newspapers (which are also concerned not to be exposed to litigation). This is a level of censorship below the overriding level of State censorship.

2 *State censorship of immoral conduct*

There is much legislation in New Zealand that limits immoral, indecent or obscene conduct (as opposed to harmful conduct). This includes:

- Section 124 of the Crimes Act 1961 under which it is a crime to distribute indecent objects (which are not publications within the meaning of the Films, Videos, and Publications Classification Act 1993) or to exhibit an indecent show. The Films, Videos, and Publications Classification Act 1993 does not deal with live sex shows. It only deals with "publications" as defined in section 2 of the Act.
- Section 16 of the Trade Marks Act 1953 under which it is an offence to register a trade mark contrary to morality.
- Section 13 of the Postal Services Act 1987 under which it is an offence to post an indecent article.

- Section 8 of the Telecommunications Act 1987 under which it is an offence to use indecent or obscene language on the telephone with the intention of offending the recipient.
- Section 8A of the same Act under which it is an offence for commercial operators of telephone lines to use indecent or obscene language. 0900 providers must agree to abide by Telecom's Code of Conduct which includes respecting moral and ethical standards in the form and content of their services.²⁸ The Films, Videos, and Publications Classification Act 1993 does not deal with telephone services such as sex telephone lines, videophones, or computer bulletin boards (unless a copy is in tangible form such as on magnetic disk).
- Section 4 of the Broadcasting Act 1989 under which broadcasters must comply with standards of good taste and decency. The Films, Videos, and Publications Classification Act 1993 does not deal with broadcasting except in the limited way discussed later in this paper.
- Section 4 of the Summary Offences Act 1981 under which it is an offence to use indecent or obscene words to any person in a public place. (Section 4 does not apply to publications within the meaning of the Films, Videos, and Publications Classification Act 1993.)
- Section 62 of the Human Rights Act 1993 which makes it unlawful to subject a person in, for example, the work place, to offensive behaviour by the use of visual material of a sexual nature and which has a detrimental effect on that person.

This legislation does not appear to be perceived as censorship by the community possibly because some of it focuses on conduct and public order (sometimes

²⁸ As referred to in *Briefing Paper to the Chairman Internal Affairs and Local Government Select Committee on Films, Videos, and Publications Classification Bill* (MOC/1, Ministry of Commerce, 24 May 1993), 7. In 1995 Telecom NZ Ltd ended its 0900 telephone sex lines. However, similar lines can be accessed directly from overseas.

associated with a particular item on which a finding of fact on such matters as indecency has to be made) that offends against decency and in doing so requires a court to assess whether conduct breaches legislation having regard to contemporary standards of propriety in the community and to the particular circumstances in which the conduct takes place.²⁹ Its focus is on conduct and not on restricting the availability of an item although this can be a necessary consequence. In this respect it differs from the focus of the Films, Videos, and Publications Classification Act 1993 which is on the status of the publication itself and its availability with offences being committed from conduct associated with that publication. The focus of the Act is not one of having regard to conduct associated with a publication and having regard to particular circumstances but is on the publication itself, having regard to (as will be elaborated shortly) what the community thinks.

3 *Bodies related to the censorship function*

In addition to the Office of Film and Literature Classification these are:

- ***The Labelling Body*** is approved by the Minister of Internal Affairs under section 72 of the Films, Videos, and Publications Classification Act 1993. It functions to *rate* films and videos, ie to provide consumer information as to audience suitability for films and videos that are unlikely to be restricted. If a film or video is likely to be restricted to persons over the age of 16, the Labelling Body forwards it to the Office of Film and Literature Classification

²⁹ For example, see *Jeffrey v Police* 4.5.94, Tipping J, HC Christchurch AP 53/94. This was a decision on section 4(2) Summary Offences Act 1981. It is not necessary to prove someone was actively offended, only that persons hearing the words spoken are likely to be offended. It is an objective test in that intention to offend is irrelevant. See also the Court of Appeal decision of *Police v Newsmedia Ownership Ltd* [1975] 1 NZLR 610, 625 where the test was whether there was a "sufficient affront to the ordinary common standards of propriety in the community" on the basis that a newspaper was the equivalent of words spoken in a public place. This decision was overruled by the Court of Appeal case of *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404 which confirmed that the test under the Indecent Publications Act 1963 was "injurious to the public good".

for classification³⁰. In practice, the Labelling Body is guided by overseas classifications.

Only films and videos are precensored. Other publications are not although it would be logical to apply the principle of consumer information and precensorship to all publications. The rationale for films and videos only is that it is obviously too difficult to examine all publications. Furthermore, once a person is exposed to a film its images do have an impact on them regardless of their ability to fully comprehend it. Viewers are a captive audience.

- ***The Advertising Standards Authority*** regulates advertisements including broadcast advertisements. It is a voluntary industry funded body. It has developed a Code of Practice for Advertising. The Office of Film and Literature can also scrutinise advertisements so long as they are in tangible form.
- ***Broadcasting Standards Authority*** hears complaints about broadcast material (except advertisements) that contravenes the standard of good taste and decency. It has developed Codes of Broadcasting Practice which contain Approved Codes drawn up by broadcasters.
- ***The Customs Department*** seizes objectionable publications under section 48 of the Customs Act 1966.

The Act is therefore one part of censorship in New Zealand. However, much of that censorship focuses on offence and good taste. The Act focuses on harm.

Censorship in New Zealand is a mix of self regulation, and government intervention.

³⁰ The video industry commenced the labelling of videos in the early 1980's to improve the image of the industry. Then, videos were either dealt with under the Indecent Publications Act 1963 or by the film censor if it was claimed that the video was to be exhibited publicly. The film censor was perceived to be more liberal. See n 13, 38.

³¹ See

³² Sec

B *The Symbolism of State Censorship and the Test of Harm*

Although there is much censorship in the marketplace, in legislation dealing with conduct, and by other bodies, State censorship is symbolic of everything that democracy does not represent. For this reason it has a high public profile and is cautiously applied. However, censorship exists because the community perceives certain material to be harmful to the community. This cautious application is reflected in the Act appearing to go further than a conservative view of morality based on distaste and offensiveness and is stated to be based on a more liberal view of harm (with its assumption that people will tolerate what they perceive not to be harmful). The wording of section 3 of the Films, Videos, and Publications Classification Act 1993 reflects the awareness of the concept of harm in that it uses the word "injurious". It also uses "objectionable" instead of "indecent" to reflect the description of material which will be banned outright.³¹ "Indecent" had connotations of morality even though the test that defined it in the repealed legislation³² used "injurious" and therefore embodied the concept of harm. The symbolism of censorship is also reflected in the title of the Act which does not refer to censorship but to "classification". This emphasises that the Act focuses not on banning publications outright (ie not on censorship), but on classifying them, not necessarily so that all of the public cannot access them (classified as objectionable) but where appropriate so that some members of the public cannot access them (classified as restricted) or that all members of the public can access them (classified as unrestricted).

The determination of status in the Act divorced from conduct in particular circumstances, and expressions in a tangible form being more enduring than spoken

³¹ See n 8, 11.

³² Section 2 Indecent Publications Act 1963, and section 2 Video Recordings Act 1987.

expressions, are possible factors in the symbolism attached to censorship of tangible expressions and why the liberal view appears to prevail in the overriding test.

It could be said that the essence of the symbolism of censorship is contained in the freedom of the press. In a minor way the Act protects the freedom of the press. It does this by excluding newspapers from being the subject of serial publication orders.³³

C Section 3: Harm

1 Section 3 in relation to the Act as a whole

Section 3 is the heart of the Act. It is the basis on which classification decisions are made. It contains the criteria which the Classification Office must have regard to in classifying publications. Having examined a "publication" as defined³⁴ according to the statutory criteria in section 3, the Classification Office can, under section 23 of the Act using the harm test, classify it as objectionable, restricted or unrestricted. It can then impose display conditions using the offence to reasonable members of the public test. The Act also contains penalty provisions relating to conduct associated with publications which have a certain status.

2 The structure of section 3

In classifying a publication the censor must first establish whether there is jurisdiction to classify the publication under section 3(1) by asking whether the publication deals with matters such as sex, horror etc.

³³ See section 2 Films, Videos, and Publications Classification Act 1993 which excludes newspapers from the definition of "serial publication".

³⁴ See the Appendix to this paper.

Subsection 2 deems certain kinds of activity objectionable, and subsection 3 requires other kinds of activity to be given particular weight according to their extent, manner and degree in the publication along with other relevant factors listed in subsection 4. The presence of subsection 3 items increases the likelihood of a publication being injurious to the public good but is not conclusive.

3 *Interpreting section 3 - the meaning of injurious*

A key issue that will arise in interpreting section 3 will be (as it was under the repealed legislation) the meaning of "injurious" (including the distinction between offence and harm, proof of harm, the requirement for standards, the nature of those standards, establishing standards, and what treatments amount to being harmful).

(a) *The distinction between harm and offence*

The test "availability is likely to be injurious to the public good" is rigorous. As stated, it contrasts with the lesser offence test in the display provisions of section 27 of the Act, a test which is used in Australia³⁵ and in the United States. In the United States Supreme Court case of *Miller* it was said:³⁶

A state offense must also be limited to works which, taken as a whole, appeal to the prurient³⁷ interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

However, the Morris Report³⁸ said that the Supreme Court's statement in *Miller* has been described as covering only the really hard core pornographic material so it is likely that the offence test is not the same test as is understood in New Zealand, ie

³⁵ Classification (Publications, Films and Computer Games) Act 1995 (Cth), section 11 and sch (National Classification Code).

³⁶ *Miller v State of California* 413 US 15; 37 L Ed 2d 419.

³⁷ Meaning includes: Uneasily or morbidly interested, curious or craving: dallying with lascivious thoughts. *Chambers Twentieth Century Dictionary* (New edition, T & A Constable Ltd, Edinburgh, Reprinted 1974).

³⁸ See n 1, 151.

as a wider standard than *injurious*. This indicates that the test cannot always be assessed from the words.

The test is not an affront to commonly accepted standards.³⁹

Last century, the test of obscenity was the *Hicklin* test of whether material depraved and corrupted "those whose minds are open to such immoral influences".⁴⁰

The focus was therefore on the corruption of morals, and on the corruption of the most weak minded persons. The test was used in early censorship legislation in New Zealand under the Offensive Publications Act 1892 to ban publications which were "obscene", "immoral" or "indecent" (including publications which referred to sexual disease). The Indecent Publications Act 1910 was enacted and had the same test as the 1892 Act with the addition that it protected publications which had merit. Because the Act was conservatively interpreted, the *Hicklin* test was used until 1939 when literary merit was actually taken into account.⁴¹ The Cinematograph Films Act of 1916⁴² had the test of "public order", "decency" and "undesirable in the public interest" and was enacted due to the concern about the effects of films on young people. In 1954 the Indecent Publications Act 1910 was amended so that "indecent" included "undue emphasis on matters of sex, horror, crime, cruelty or violence" due to the concern over the relationship of comics with juvenile crime.⁴³

³⁹ *Society for Promotion of Community Standards v Everard* [1987] 7 NZAR 33, 56. (A High Court decision).

⁴⁰ *R. v Hicklin* (1868) LR 3QB 360, 371 as referred to in *R. v Butler* 89 DLR (4th) 449, 463.

⁴¹ See n 13, 9-10 for an outline of the history of censorship in New Zealand. *Censored A short history of censorship in New Zealand*

⁴² See n 13. The Cinematograph Films Act 1961 was later enacted to consolidate regulations.

⁴³ See n 13. The Court of Appeal banned the book *Lolita* on the basis of this legislation despite the book having merit.

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"Corrupted" was also used in the now repealed Indecent Publications Act 1963 although it was not the overriding test.⁴⁴

The *Hicklin* test was also used in the United States until 1934⁴⁵ and in England until 1959.⁴⁶ It was also used in Canada until replaced by a legislated definition of obscenity.⁴⁷ This legislated definition could be said to affirm the morality test, ie society's sense of what is right and wrong, but it has been interpreted⁴⁸ as recognising harm that can be done to society by such treatments. This interpretation shows the shift from morality to harm, from conservatism to liberalism.

Drawing a distinction between harm and morality can be difficult. What is now seen as as morality could have been justified in years past as causing harm to society. Is it just a change of words to justify restrictions on freedom of expression in today's civil liberties climate and to disassociate the reasons for restrictions today from the reasons of years past? As Sopinka J in *Butler* said:⁴⁹

The prevention of "dirt for dirt's sake" is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the Charter.

However, he linked morality to harm when he said:⁵⁰

⁴⁴ Section 11(1)(e) Indecent Publications Act 1963.

⁴⁵ See LH Tribe *American Constitutional Law* (2nd ed, The Foundation Press Inc., New York, 1988), 907-908. The test was rejected when a US court held that the book *Ulysses* was not obscene and "suggested instead a standard based on the effect on the average reader of the dominant theme of the work as a whole". Later in the case of *Roth v United States* 354 US 476 (1957) the test shifted from immoral influence to prurient appeal

⁴⁶ J Green *The Encyclopedia of Censorship* (Facts on File, New York, 1990) 12.

⁴⁷ Section 163(8) Criminal Code 1985: "For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene." This section first came into force in 1959. For material to be obscene under this section it must deal with sex.

⁴⁸ See n 27.

⁴⁹ See n 27, 476.

⁵⁰ See n 27, 477.

.....notions of moral corruption and harm to society are not distinct but are inextricably linked. It is moral corruption of a certain kind which leads to the detrimental effect on society.

His view is that pornography can harm society due to the attitudinal changes (such as increased callousness towards women) that occur in viewers of such material.

The requirement in the New Zealand classification scheme to distinguish between offence and the avoidance of harm is present not only in the display conditions in the Act⁵¹ but also in broadcasting⁵² where the standard required of broadcasters is one of good taste and decency. Such standards are broader than harm and impose more censorship. They reflect the conservative view, the standard of behaviour that reasonable members of the community would adopt in the particular situation. Harm is an objective test, but then so is offence. What can be said about harm is that it should result in less censorship than offence.

It is unlikely that the test of harm will be changed. It has existed in New Zealand law since 1963 in the Indecent Publications Act 1963, in the Cinematograph Films Act 1976 (replaced by the Films Act 1983 but which retained the test of "likely to be injurious to the public good"), and in the Video Recordings Act 1987, and is supported by Canadian jurisprudence as in the case of *Butler*. It is in keeping with the concept that in a democracy the focus should be on freedom of expression. The Indecent Publications Act 1963 was enacted to deflect the focus from content and to create the broader test of harm so that meritorious works such as *Lolita* would no longer be banned. Harm avoids the need to define pornography.

From the brief history outlined, the following can be identified as factors causing change to censorship legislation:

⁵¹ Section 27(2) Film, Videos, and Publications Classification Act 1993.

⁵² Section 4(1)(a) Broadcasting Act 1989.

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- The changes in new technology ie films (the Cinematograph Films Act 1916 and subsequent film legislation), magazines and comics (the amendment to the Indecent Publications Act 1910), and videos (the Video Recordings Act 1987).
- The need for the rationalisation of legislation from a machinery point of view.
- The perceptions of the community as to the effects of technology and what it depicts, on persons exposed to that material (the 1954 amendment to the Indecent Publications Act 1910).
- Social changes such as the sexual revolution of the 1960's, the changing role of women, and the availability of harder pornography, (the Indecent Publications Act 1963), and the liberal, moral, and feminist responses to those changes (ie a shift in focus from content to effect).

All of these factors have been relevant to the enactment of the Act. The final factor of social change is reflected in the feminist view which which is incorporated in the Act for the first time although previous legislation used the word "denigrate".

(b) *Standards required in lieu of proof of harm*

- (i) *Proof of harm:*** *Comptroller of Customs v Gordon and Gotch (NZ) Ltd*⁵³ provides the reasons for the Court's finding that there does not need to be concrete evidence of injury to the public good. It is the task of the expert body, then the Indecent Publications Tribunal, the Film Censor, and the Video Recordings Authority (and now the Office of Film and Literature Classification), to exercise judgment about the likelihood of injury to the public good. Jefferies J based his conclusion of actual proof not being required to determine injury to the public good on the Indecent Publications Tribunal being an expert body and being able to draw on its own experience to reach a decision, and also on a doctrine adopted by the United States

⁵³ [1987] 2 NZLR 80.

Supreme Court which made a distinction between adjudicative facts (facts which concern only the parties to a case) and legislative facts (facts which form the basis for the creation of law and policy). He said⁵⁴ that the Indecent Publications Tribunal (now replaced by the Office of Film and Literature Classification) in determining injury to the public good is not deciding on facts but is making a judgment, and is taking the place of judge and jury. Section 4 of the Act codifies that decision and also says that if evidence is available then it is to be considered. In doing so, it eliminates the debate of whether such depictions are a symptom of harm or cause harm.

Support for this view is that there does not need to be concrete proof is found in the Canadian Supreme Court. (When referring to obscene material which is degrading or dehumanising) Sopinka J said:⁵⁵

This type of material would, apparently, fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible of exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole.

Further, quoting from *Towne Cinema*:⁵⁶

The most that can be said, I think, is that the public has concluded that exposure to material which degrades the human dimensions of life to a subhuman or merely physical dimension and thereby contributes to a process of moral desensitization must be harmful in some way.

Not requiring proof of a causal relationship between certain depictions and harm to society is a fundamental shift from the liberal view of actual proof being required

⁵⁴ See n 53, 92.

⁵⁵ See n 27, 467.

⁵⁶ *R v Towne Cinema Theatres (Ltd)* 18 DLR (4th) 1.

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and accommodates feminist concerns that the harm done to society is the attitudes it causes to women. It provides a rationale for more censorship, rather than less censorship. It also provides a basis for saying that the Act by reducing availability is not attempting to deal with what causes such material but with its *effect* on the community.

- (ii) **Requirement for standards in section 3:** Jefferies J in *Gordon v Gotch* did not discuss using standards to gauge injury to the public good although he did say⁵⁷ that it is *generally accepted* that explicit displays of sexual intercourse are injurious to the public good. He said that proof was not required because the decision on indecency was a judgment made by an expert body drawing on its experience (and that would be evidence in itself in any other forum), and any other available evidence, and that the usual forms of proof may be inappropriate. The decision does not address the issue of *how* the expert body is to form that judgment.

Although there is no expressly worded test of a standard such as "offence to reasonable members of the public" in section 27, it is necessary, because of lack of proof, to take into account public perceptions of what is injurious to the public good. The Canadian jurisprudence accepts that harm cannot be proved and so relies on community standards to gauge harm. That standard is the standard defined by the community as a whole.⁵⁸

Because this is not a matter that is susceptible to proof in the traditional way and because we do not wish to leave it to the individual tastes of judges, we must have a norm that will serve as an arbiter in determining what amounts to the undue exploitation of sex. That arbiter is the community as a whole.

This is a fundamental and clearly stated insight on the part of the Canadian jurisprudence as to the interrelationship between harm, standards and proof and is

⁵⁷ See n 53, 98.

⁵⁸ See n 27, 470.

relevant to understanding the New Zealand Act. It has implications not just for pornography but for other material covered by the Act where the research as to the causal relationship between exposure to material and harm is contradictory.

Although section 3 indicates those matters which are likely to be injurious to the public good and those which must be given the closest scrutiny, in applying them to the millions of depictions that the Office of Film and Literature Classification examines, the Office must, within the guidelines of the Act, judge what the community is prepared to tolerate.⁵⁹

The Office is not imposing censorship but is assessing what censorship the community wants. Its decisions must reflect tolerance rather than imposing a level of tolerance. The two tier approach reflects what society at present is not prepared to tolerate and this may change in the future. Consistent with the reflection of tolerance is the ability of members of the community under section 13 of the Act to submit material for classification that they find intolerable and for the Office to assess that intolerance against the tolerance of the community at large. This is one mechanism in the Act for the Office of Film and Literature to maintain awareness of community tolerance.

The requirement for standards in lieu of proof accommodates feminist concerns, and also reflects an aspect of the conservative view (which requires standards to gauge morality).

(c) *Nature of community standards*

In applying community standards of tolerance to gauge harm, it is necessary to understand the nature of those standards. Community standards are those of

⁵⁹ See *Censorship Procedure* (Law Reform Commission Report No. 55, Commonwealth of Australia, 1991) 3: "The objective of Australian censorship law is to regulate the availability of films and publications within the broad framework of general community standards".

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tolerance of harm and not taste, they are contemporary, and they are those of the average New Zealander who cares about the possibility of harm. New Zealand courts in dealing with censorship have not addressed themselves to any great degree to the nature of standards.

- (i) ***Tolerance not taste:*** The Canadian Supreme Court has confirmed that the standard is an objective one of tolerance and not taste.⁶⁰

What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary standard of tolerance to allow them to see it.

It also confirmed that the Canadian community would tolerate varying degrees of explicitness depending on the audience and circumstances.⁶¹ This is embodied in the Films, Videos, and Publications Classification Act 1993 in the ability to restrict publications, and accords with the liberal viewpoint of protecting children, and the marketing of material not causing offence.

- (ii) ***Relationship between tolerance and harm:*** Sopinka J said:⁶²

The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an antisocial manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Antisocial conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of tolerance. The inference may be drawn from the material itself or from the material and other evidence. Similarly evidence as to the community standards is desirable but not essential.

⁶⁰ See n 27, 465.

⁶¹ See n 27, 465 quoting from the 1985 Canadian Supreme Court case of *R v Towne Cinema Theatres Ltd* 18 DLR (4th) 1.

⁶² See n 27, 470-471.

In other words Sopinka J uses the community standard of tolerance to gauge the risk of harm. Gonthier J elaborated:⁶³

It must mean tolerance not only of the materials, but also tolerance of the harm which they may bring about. It is a more complicated and more reflective form of tolerance than what was considered by Dickson C.J.C. in *Towne Cinema*.

In view of the criteria that Classification Office must have regard to under the New Zealand legislation it can be said that the harms and what the community finds intolerable are already specified to a large degree and that it is in unclear cases or in cases that don't readily fit the specified criteria that the Classification Office must consider the question of tolerance.

- (iii) **Contemporary standards:** In *Miller* it was said that the test is whether the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest.⁶⁴ The test is therefore one of contemporary community standards. This statement acknowledges that standards are not fixed and change with time. As the Canadian Supreme Court said of the Canadian Criminal Code:⁶⁵ "Community standards as to what is harmful have changed since 1959." A difficulty is monitoring these changing standards. This is followed through in the Act which provides for a research unit⁶⁶ the function of which is to ascertain current research and there is provision to consult with interested groups.⁶⁷

⁶³ See n 27, 496.

⁶⁴ See n 36, 431.

⁶⁵ See n 27, 478.

⁶⁶ Section 88 Films, Videos, and Publications Classification Act 1993.

⁶⁷ Section 21 Films, Videos, and Publications Classification Act 1993.

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The monitoring of standards was illustrated in the decision of *Re Penthouse (US)* Vol 19, No 5⁶⁸ where the Indecent Publications Tribunal changed its guidelines after having heard evidence that sexual depictions intended for sexual arousal were not of themselves harmful.

In *Gordon v Gotch*⁶⁹ it was said that there should be no rigid adherence to guidelines.

What is now accepted is explicit sex between adults of itself whereas before *Re Penthouse* it would have been banned by the conservative viewpoint. Pornography is not defined in the Act nor is it defined in other jurisdictions relevant to New Zealand. Explicit sex for the purpose of sexual arousal that is not objectionable under section 3 is likely to be restricted. Group sex, and homosexual sex are no longer banned. In *Butler*⁷⁰ it was said that explicit sex that is not violent and neither degrading nor dehumanising nor uses children in its production is generally tolerated in Canadian society but its availability is restricted. *Butler* supports the approach in *Re Penthouse*.

- (iv) **Average person:** *Miller* used the test of the average person. It has been said of standards in Canada, after a review of cases earlier than the Supreme Court case of *Butler*, that standards are not set by those of lower taste nor by those of puritan taste but somewhere in between.⁷¹ Gonthier J supported this in *Butler* when he said:⁷²

⁶⁸ See n 25.

⁶⁹ See n 53.

⁷⁰ See n 27, 471.

⁷¹ K. Mahoney "Canaries in a Coal Mine: Canadian Judges and the Reconstruction of Obscenity Law" in the Schneiderman (ed) *Freedom of Expression and the Charter* (Carswell)) 145, 149-150.

⁷² See n 27, 495.

Tolerance would be some form of enlightened, altruistic taste, which would factor in and sum up the tastes of the whole population.

He elaborated on this when he said⁷³ that when different segments of a pluralistic society agree on what is not good then the state can intervene in the name of morality. New Zealand case law accords with the view that it is the finding of the ordinary person who is neither hypersensitive or insensitive.⁷⁴

(v) ***Community that cares:*** The average person has been extended to be the average person who cares and not an average of persons which includes persons who don't care.⁷⁵

(vi) ***Community defined geographically:*** In *Miller* it was also said that the community was that of the State of California⁷⁶ which is logical considering it was a California statute under consideration and the jury was drawn from the local community. New Zealand has a fairly homogenous culture, is small geographically and has a mobile population, and the Act is a public Act. For these reasons, in New Zealand, the community is that of the whole country. The Canadian Supreme Court confirmed that in Canada it is the standards of the community as a whole and not the standards of a small section of the community.⁷⁷

(d) ***Establishing standards***

This is extremely difficult. One judge has asked: How does one have one's finger "on the pornographic pulse of the nation?"⁷⁸ Under the Act it is a matter for the

⁷³ See n 27, 498.

⁷⁴ For example see the High Court decision of *Zdrahal v Wellington City Council* [1995] 1 NZLR 700, 707. (Whether a swastika painted on a house was offensive under the Resource Management Act 1991).

⁷⁵ See n 71, 150.

⁷⁶ See n 36, 435.

⁷⁷ See n 27, 465.

⁷⁸ See n 71, 150.

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judgment of the Office of Film and Literature Classification having regard to its expertise and to relevant research and consulting with interested parties. The recourse to the Film and Literature Board of Review to review a classification decision *de novo* is a safety net.⁷⁹ There is no escaping the fact that the Office of Film and Literature Classification is not only the judge, but is also the jury of average persons in the community. In being the judge it must assess what the view is of the average person in the community, but in being the jury the standards of the individual censors impact on the decision. This applies also to the Film and Literature Board of Review.

In Canada it has been said⁸⁰ that market availability is used as an indicator of community acceptance and that this is not a good indicator because mostly men purchase pornography and that this leads to a male defined standard of tolerance. In New Zealand market availability is not used as an indicator of community standards (at least not directly). Persons who find the availability of material unacceptable can submit it to the Office of Film and Literature Classification for classification.⁸¹

In the end "It is a judgment on questions of a speculative nature."⁸²

A community standards index based on demographic and attitudinal variables could be used to assess community tolerance of say pornography in general but this would not assist in reaching a judgment on the degrees of pornography.

⁷⁹ It is unlikely that there will be many cases appealed from the Film and Literature Board of Review. This prediction is based on the fact that there have been very High Court and Court of Appeal cases under the repealed legislation.

⁸⁰ See n 71, 150.

⁸¹ Section 13 Films, Videos, and Publications Classification Act 1993.

⁸² See n 71, 150.

(e) *What amounts to injurious*

(i) *Wording of section 3:* The broad meaning of injurious is indicated by the words “such as sex, horror” in section 3(1).

- *Section 3(1) - availability:* “Availability” was not used in the repealed legislation. It means that in appropriate cases (but not in section 3(2) cases) availability can be restricted to certain persons, for example, to persons over the age of 18 and it is only when made available to persons not in the designated class that the publication is harmful. (A common example is sexually explicit material intended for sexual arousal which does not come within the criteria of section 3. Such material, as previously stated is tolerated by the community but only if it is made available to adults). If section 3(2) applies then the availability of a publication to anyone is deemed to be harmful.
- *Section 3(1) - likely:* This was not present in the repealed legislation except in the Films Act 1983. The Office of Film and Literature Classification must also consider what the likelihood of harm is and whether it is a real likelihood and not a paranoid possibility.⁸³ It could be said that “likelihood” is used to indicate that actual proof of the harm is not required.

The wording of section 3(2),(3) and (4) gives an indication of what “injurious” is likely to mean. These words provide more guidance to classification officers than the repealed legislation.⁸⁴ However, in practice, it can be difficult to distinguish between section 3(2) and (3).

⁸³ See n 39, 57.

⁸⁴ **Indecent Publications Act 1963**, section 2: “ ‘Indecent’ includes describing, depicting, expressing, or otherwise dealing with matters of sex, horror, crime, cruelty, or violence in a manner that is injurious to the public good.”

Section 11: “(1) In classifying or determining the character of any book or sound recording the Tribunal shall take into consideration-

- (a) The dominant effect of the book or sound recording as a whole:
- (b) The literary or artistic merit, or the medical, legal, political, social, or scientific character or importance of the book or sound recording:

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- (ii) **Morality disguised as harm:** Certainly the items in section 3(2) must be accepted as being "injurious" because they are deemed to be so. Many of them seem to have originated from the first guideline as expressed in *Re Penthouse*.⁸⁵ However, do all section 3(2) items truly reflect what society would not tolerate others being exposed to based on the harm to society that might follow? For example, section 3(2)(d) is curious. A publication is deemed objectionable (ie is banned outright) if it promotes or supports or tends to promote or support "The use of urine or excrement in

(c) The persons, classes of persons, or age groups to or amongst whom the book or sound recording is or is intended or is likely to be published, heard, distributed, sold, exhibited, played, given, sent, or delivered:

(d) The price at which the book or sound recording sells or is intended to be sold:

(e) Whether any person is likely to be corrupted by reading the book or hearing the sound recording and whether other persons are likely to benefit therefrom:

(f) Whether the book or the sound recording displays an honest purpose and an honest thread of thought or whether its content is merely camouflage designed to render acceptable any indecent parts of the book or sound recording."

Video Recordings Act 1987, section 2 defined "Indecent" the same as the the Indecent Publications Act 1963.

Section 21(2):

"In determining the classification of any video recording, the Authority shall consider the following matters:

(a) The dominant effect of the video recording as a whole:

(b) The extent to which the video recording has merit, value, or importance in relation to artistic, social, cultural, or other matters:

(c) The persons, classes of persons, or the age groups of the persons, by whom the video recording is most likely to be viewed:

(d) The extent and degree to which and the manner in which the video recording depicts, includes, or treats anti-social behaviour or offensive language or behaviour:

(e) The extent and degree to which and the mannner in which the video recording denigrates any particular class of the general public by reference to the colour, race, ethnic or national origins, sex, or religious beliefs of the members of that class:

(f) The particular purpose for which the video recording is intended to be used."

Films Act 1983, section 13(1)(b), the Chief Censor shall:

".....examine the film to determine whether the exhibition of the film is or is not likely to be injurious to the public good."

The matters that the Chief Censor had regard to were similar to those in the Video Recordings Act 1987 except between the words "anti-social behaviour" and "or offensive language" in (d) were the additional words: "cruelty, violence, crime, horror, sex, or indecent". There was no equivalent of (c) or (f).

⁸⁵ See n 25, 472.

association with degrading or dehumanising conduct or sexual conduct” whereas sexual or physical conduct of a degrading or dehumanising or demeaning nature is said in section 3(3) to be something that must be given weight to, ie it is not banned outright. While it could be said that the addition of urine or excrement to such conduct adds an element of distaste, it is questionable whether it adds an element of harm. It could be said that this is an example of morality disguised as harm.

Could section 3(2) be used to ban *Lolita*? Section 3(4)(c), which allows merit to be taken into account, is not a defence nor does it seem to apply to section 3(2). In order for *Lolita* not to be banned it would seem that the overall test of likely to be injurious to the public good would have to be used, despite the fact the section 3(2) deems certain publications to be objectionable.

- (iii) *Section 3(2) - promotes or supports has liberal elements*: At first glance it appears that under section 3(2) a publication can be banned on the basis of content alone, whereas under section 3(3) it can be banned or restricted on the basis of representation (extent, manner and degree) and content. However, the words *promotes or supports or tends to promote or support* contain a representational element. It was intended that something more than a mere portrayal was necessary so that serious treatments of the subject were not rendered objectionable.⁸⁶ It is the manner in which and the extent and degree to which content is represented that makes it injurious to the public good. In considering section 3(2) it is difficult to depart from the words of section 3(2), “extent” “manner” and “degree” although these words are not used in section 3(2). Using the urolagnia example it could be said that it would be exceeding the Act to ban a publication on this basis if the advertisement together with other advertisements of a similar nature is a small part of the publication, is individually short and the publication does not go further and actively support the practice. Against this it could be said that by allowing the

⁸⁶ See n 17, 8.

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advertisement to be placed in the publication, the publication is tending to promote or support urolagnia. In applying the Act it would appear that the conservatism of section 3(2) is not as clear cut as it first appears and that the elements described in section 3(2) are allowed to some extent, so long as they are not injurious to the public good.

- (iv) *Feminist concerns of discrimination are in the harm test:* Section 3(3)(a)(iii) of the Act uses the words “degrading”, “dehumanising” and “demeaning”. These words are intended to address feminist concerns about the portrayal of (usually) women in pornography although the wording is gender neutral (children in pornography are more specifically dealt with under section 3(2)(d)). They catch the harm done to women⁸⁷ and therefore to society by depictions which subordinate women and lead to a negative image of women.⁸⁸ ⁸⁹ Section 3(3)(e) catches material which represents that members of a particular class of the public are inherently inferior by reason of a characteristic that is a prohibited ground of discrimination under the Human Rights Act 1993⁹⁰ but section 3(3)(a)(iii) goes further.

⁸⁷ *Human Rights in New Zealand: Report to the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights* (Ministry of Foreign Affairs and Trade, Information Bulletin No. 54, June 1995, Wellington, New Zealand) 8. It said that the Act “which seeks to curb the availability of pornographic material harmful to the public good, is aimed in part at preventing the demeaning of women”. The United Nations Human Rights Committee monitors countries’ compliance with the Covenant.

⁸⁸ For statements against discrimination see:

- Article 1 Universal Declaration of Human Rights.
- Articles 3 and 26 International Covenant of Civil and Political Rights.
- Articles 5 and 6 Convention on the Elimination of all forms of Discrimination Against Women.
- Section 19 New Zealand Bill of Rights Act 1990.
- Sections 15(1) and 28 Canadian Charter of Rights and Freedoms.

⁸⁹ Similar concerns have been expressed in Australia. See n 35 *Classification Code*, “(d) the need to take account of community concerns about (ii) the portrayal of persons in a demeaning manner”. This provision is new.

⁹⁰ Section 21 Human Rights Act 1993: Prohibited grounds of discrimination are: Sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, and sexual orientation.

The Canadian Supreme Court said:⁹¹

There has been a growing recognition in recent cases that material which may be said to exploit sex in a 'degrading or dehumanizing' manner will necessarily fail the community standards test they run against the principles of equality and dignity of all human beings.

Catherine MacKinnon and Andrea Dworkin in 1983 defined pornography in terms of sexually explicit material which subordinates women so that women who had been discriminated against by it could have a civil remedy. Actions which would give rise to a civil remedy would be forcing pornography on a person, assault of a person linked to pornography, and coercion of a person in producing pornography. This was aimed at the effects of pornography on specific persons.⁹² The definition of pornography was accepted by the Committee of Inquiry into Pornography but not so that it be used as a basis for classification.⁹³ Although pornography is not defined in the Act, much of what is contained in the definition is expressed in section 3 along with non sexual material. The changing role of women which gave rise to feminist thinking regarding pornography, thinking which is encapsulated in the definition and is supported by women's lobby groups, has likely been a factor in developing the perception of the harm of pornography without proof. "Demeans" was added in the second version of the Bill to give effect to feminist concerns and encapsulates the concept of lowering dignity. In *Gordon v Gotch* the Court found that certain depictions of women did not symbolise all women and therefore did not "denigrate" (ie lower the reputation of) all women.⁹⁴

⁹¹ See n 27, 466.

⁹² See section 62 Human Rights Act 1993 (referred to earlier) for the New Zealand solution.

⁹³ See n 1, 28.

⁹⁴ See n 53. This view was approved in *Community for Promotion of Community Standards v Everard*. See n 39.

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Effect of consent: The Canadian Supreme Court also said⁹⁵:

Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.

This seems to support the view that the words “degrading”, “dehumanising”, and “demeaning” will be interpreted by the courts to accommodate feminist concerns.

- (v) **Section 3(4)(a) - dominant effect:** While section 3(2) and (3) deal specifically with harm, section 3(4) deals with broader matters that could be harmful relating to the overall effect of a publication, its impact, its value, its readership, its purpose, and other circumstances.

Under section 3(4)(a) the Office of Film and Literature Classification must consider the dominant effect of the publication as a whole. Dominant effect is likely to be the effect on the minds of the persons exposed to the publication.⁹⁶ It is not the dominant content although it does have a necessary relationship with content. With pornographic material this is likely to be sexual arousal from looking at photographs containing nudity or sexual activity or reading about such activity. With other kinds of material the dominant effect on the minds of persons exposed is likely to be less clear. How can an expert body assess what the dominant effect is on the mind of the persons likely to be exposed to the publication? Possibly this is the reason for section 3(4)(d) (persons for whom the publication is intended) and perhaps the two paragraphs are to be read together. It seems that here again, community standards must be had regard to in interpreting this paragraph.

⁹⁵ See n 27, 466.

⁹⁶ *Society for Promotion of Community Standards Inc v Waverley International (1988) Ltd* [1993] 2 NZLR 709, 718.

It is current classification practice to classify publications containing explicit sex intended to sexually arouse as at least objectionable unless restricted to persons who have attained the age of 18 years. There is no legislative requirement that 18 be the age at which such material is deemed not to be harmful, but it is a current convention of New Zealand censorship practice and reflects the community perception that such material is harmful to society if made available to persons under 18 years.

As section 3(4)(a) appears to be a key provision in the Act, it might be helpful if applying the Act to the publication started at this point. Having arrived at a tentative classification based on dominant effect (having regard to section 3(1)), any particular references that cause concern could be considered under sections 3(2) and (3) as to whether they affect the classification decision tentatively arrived at under section 3(4)(a). It does not appear to be necessary to establish that an element in a publication is its dominant effect for a publication to be objectionable or restricted.

- (vi) ***Impact of the medium:*** Section 3(4)(b) of the Act says that the impact of the medium is something that must be taken into account.

In *Butler* Gonthier J (in agreement with the decision of Sopinka J) observed:⁹⁷

The likelihood of harm and the tolerance of the community may vary according to the medium of representation even if the content stays the same.

In other words, the impact of the medium (or any other section 3(4) item for that matter) having regard to community standards can affect the classification of a publication, ie can affect whether there is more or less censorship.

It would be tempting to use section 3(4) as a list of questions to be answered. However, it could be said that an appropriate interpretation is to deal with these matters so as to say whether they affect the classification decision tentatively arrived

⁹⁷ See n 27, 494.

⁹⁸ See

at under section 3(4)(a). For example, when considering the character of a publication under section 3(4)(c) the Office of Film and Literature Classification might find that the publication has merit. The relevance of having merit is that the publication may be transported from being restricted to persons over the age of 18 to, for example, a different age restriction for persons using the publication for a particular purpose.

D *Offence - Display*

Having classified a publication as a restricted publication, the Office of Film and Literature Classification must then consider the conditions under which it must be displayed. Restricted publications are likely to be required to be displayed in "premises, or a part of premises, set aside for the public display of restricted publications (whether or not articles other than restricted publications are also displayed in those premises or that part of those premises)".⁹⁸

Before a publication can have a display condition attached to it, it must first be classified as a restricted publication. The implication of this is that offence appears to flow out of harm. This means that such purposes as the protection of children are primary purposes and avoidance of offence a secondary purpose. A practical problem is that a publication might be offensive to ordinary members of the public but unless it is harmful to society if made available to persons outside of the restricted class there can be no restrictions on its display. At first glance section 27 appears to accommodate moral interests (supported by the liberal view that there

⁹⁸ Section 27(4)(e) Film, Videos, and Publications Classification Act 1993. There is a problem with premises set aside for such display in that although it would appear that the intention of this is to relegate such material to what are commonly known as sex shops, such shops are not defined in that they are not licenced or registered. It appears then up to the Department of Internal Affairs inspectors to make a judgment as to the nature of premises, or whether a part of premises is set aside, in enforcing the Act when a classification decision has made section 27(4)(e) a condition of display.

shall be no offence in the marketing of publications) but on closer inspection accommodates them less than is first apparent.

The test is not "good taste and decency" as it is in the Broadcasting Act 1989 but the effect seems to be similar.

E *Broadcasting - The Inconsistencies between Harm and Good Taste*

As stated, the Act only covers publications as defined. It therefore does not cover⁹⁹ such matters as telephone services, videophones, computer bulletin boards, live sex shows (which the Crimes Act 1961 cover), and broadcasting.¹⁰⁰

1 *New technology*

Section 123(4) of the Films, Videos, and Publications Classification Act 1993 which creates the offence of supplying objectionable publications says that a publication may be supplied by means of electronic transmission (other than by broadcasting). This means that so long as the publication itself can be seized, ie the magnetic disk on which the information is stored, then the supplier commits an offence. This catches, for example, operators of sex bulletin boards - if the magnetic disk containing the material can be obtained. This is as far as the Act goes in dealing with the new technology.

The Technology and Crimes Reform Bill 1994 (a Private Member's Bill) aims to deal with material not covered by the Films, Videos, and Publications Classification Act 1993, by regulating the electronic, satellite, and telephone transmission of

⁹⁹ See n 18, 8-10.

¹⁰⁰ "Broadcasting" is broadly defined in the Broadcasting Act 1989 to include new forms of broadcasting technology.

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objectionable sounds and images.¹⁰¹ It aims to do this by allowing the Office of Film and Literature to examine such material, and by allowing the equipment of the broadcaster or receiver to be seized, and by allowing the Office of Film and Literature Classification to ask the New Zealand network telephone provider to disconnect the phone service of the provider of say a pornographic bulletin board, for example when the last digit is dialled.

In Australia it has been said that governments around the world are having difficulty coping with the regulation of undesirable material being transmitted by new technology, and that the Australian Department of Transport and Communication believes that the only way to regulate is by international agreement.¹⁰²

It is not the purpose of this paper to consider the implications of the new technology for the Act.¹⁰³ However, if material transmitted by the new technology cannot be regulated then it raises the issue of whether there is any point in having the Act. It is possible that any eventual change to the Act will come about, as has occurred in the past, due to the impact of regulating material transmitted by new technology.

However there could be more emphasis on self regulation as is starting to appear with electronic access devices. Perhaps there may still be justification for having censorship legislation covering publications susceptible to censorship, even if only to provide a forum for the gauging of standards.

¹⁰¹ It is similar to the "Exon Amendment" in the United States which seeks to make telecommunication carriers criminally liable if the telephone network is used to transmit indecent material.

¹⁰² Senator Margaret Reynolds in a conference address "New Technology: What does this do for the argument on censorship and technology?" *Censorship Issues: Law, Technology and Effects*, 27 - 28 May 1993 (Brisbane: Griffith University and Queensland University of Technology).

¹⁰³ For a discussion of the new technology see n 28.

2 *Broadcasting*

Under section 4(2) of the Broadcasting Act 1989 (which is the only limit imposed in relation to the Films, Videos, and Publications Classification Act 1993 on broadcasters) no broadcaster can broadcast a film classified as objectionable or broadcast parts of a film that have been excised under the Act. This means that (but for section 4(1)(a) of the Broadcasting Act 1989) broadcasters can broadcast films that are classified as unrestricted, restricted or which have not be classified at all.

Section 4(1)(a) of the Broadcasting Act 1989 imposes the overall standard on broadcasters which is that they maintain standards consistent with the observance of good taste and decency. This restricts many more programmes than if the standard were "injurious to the public good". The rationale underlying this standard is likely to be the pervasiveness of the medium and its accessibility to young children.¹⁰⁴

One of the problems that has arisen is the screening by Sky Television of "adult" material.¹⁰⁵ Not all films shown on Sky have been classified in New Zealand and may not only contravene the standard of "good taste and decency" under section 4(1)(a) but also the higher standard of "injurious" if they had been classified as restricted, or even be deemed to be "injurious" if they had been classified. So why is Sky able to continue screening such material when it is obviously in breach of section 4(1)(a)? Under section 7 of the Broadcasting Act 1989 the broadcaster can act on a complaint in respect of particular programmes and under section 8 the complainant, if still dissatisfied, can refer the complaint to the Broadcasting Standards Authority. Under section 13, the Authority can make various orders.

¹⁰⁴ See *Federal Communications Commission v Pacifica Foundation* 438 US 726 (1978). This was a decision of the United States Supreme Court. The FCC could regulate indecent material ie material which did not conform with accepted standards of morality. Indecent material can be compared to obscene material which appeals to prurient interest or longing.

¹⁰⁵ See n 18, 9.

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The assumptions are that there have been insufficient complaints and that the Broadcasting Standards Authority accepts that there is a case for lesser standards for pay television than for free-to-air television due to its reduced pervasiveness. In addition the following decision gives an indication of the Authority's attitude to such material.

In the decision of the Broadcasting Standards Authority *Smits v Sky Network Services Limited*¹⁰⁶ the Authority considered a complaint about a programme "Playboy Late Night/After Dark" broadcast by Sky Television at 10.45pm. It found that the programme contained nudity and explicit sex and breached standard P2¹⁰⁷ of the Code of Broadcasting Practice for Sky Television which related to good taste and decency. The Authority upheld the complaint but declined to impose an order under section 13(1) since it was the first complaint lodged against Sky.

Although the Authority upheld the complaint, it seemed to do so on the basis that because the programme was at the outer limit of what was acceptable at any time on pay television it should have been screened much later so as to signal that it was outside of mainstream programming.¹⁰⁸ The description of the programme in the decision indicates that the programme had characteristics which if classified might have been classified as objectionable unless restricted to persons who have attained the age of 18 (ie as R 18). Despite the standard in section 4(1)(a) being "good taste and decency" the Authority would have allowed a programme to be screened late at night which if subject to the classification scheme might likely have been classified as objectionable unless restricted, although it did indicate that "soft porn" of the type

¹⁰⁶ Decision No: 62/94, 15 August 1994.

¹⁰⁷ "To take into consideration currently accepted norms of decency and taste in language and behaviour, bearing in mind the context in which such language or behaviour occurs."

¹⁰⁸ See n 106, 6.

under consideration was at the outer limit. This shows that the two systems do not sit well together.

The Authority did not uphold the complaint on the basis that it was discriminatory against women. The reasons of the majority were that the “average viewer” would not be encouraged to treat women differently as a result of seeing the programme because it was light hearted. It is unclear from the decision whether the majority decision is based on the proof approach rejected by the courts in previous censorship decisions, or on the harm principle, ie on the possibility of changed attitudes due to exposure to such material. The minority’s approach bordered on the “harm” principle saying that the effect was to reinforce stereotypical notions about women. Both approaches do not sit easily with the overall test of good taste and decency.

Sky argued that because it was using the New Zealand film rating system and because it was providing a service to subscribers it should not be subject to the same standards as free to air television.

The Authority said:¹⁰⁹

- Standards under the censorship legislation are different from those that apply to broadcasters and it was inappropriate for Sky to rely on them.
- “Unless the legislation” (broadcasting) “is changed to specifically exclude Sky from its jurisdiction, Sky is obliged to observe those standards”.

As earlier stated, broadcasters are not subject to the Film, Videos, and Publications Classification Act 1993 except in the limited way outlined. In view of the fact that Sky wishes to contravene the broad section 4(1)(a) standard of good taste and decency it could be said that broadcast programmes should be subject to the narrower standard of injurious to the public good under the Films, Videos, and Publications Classification Act 1993. Not all films shown on Sky are classified and

¹⁰⁹ See n 106, 3-4.

without the requirement of classification for broadcasters, the broadcaster is acting as censor without the expertise of the Office of Film and Literature Classification in the programmes that it does broadcast. It could be said that there is no problem with a broadcaster censoring on the basis of good taste and decency because that standard will prevent much material from being broadcast. However, if a broadcaster censors on the basis of injurious to the public good then it is doing so without the expertise of the state body established to perform that role.

Should the standard for subscriber broadcast be different than for free-to-air television (ie should the standard be "injurious" rather than "good taste and decency")?¹¹⁰ If broadcast films were subject to the Films, Videos, and Publications Classification Act 1993 then there would be a strong argument that there should be so that Sky can compete with video stores and cinemas. Supporting the argument that is that the access devices to Sky (ie R-18 restriction cards and PIN numbers used with decoders, and scheduling details) amount to the equivalent of video stores and cinemas restricting access where that is a term of the classification and is consistent with the principle of reduced pervasiveness (and which amounts to self regulation). The Authority in *Smits v Sky Television* said¹¹¹ that subscriber television is subject to less parental control than a video store. Against this argument it could be said that once an R18 video is in a household, it is left to parental control as to who views it.

Section 21(1)(e) of the Broadcasting Act 1989 which encourages the development by broadcasters of codes of broadcasting practice appropriate to the type of broadcasting practice taken recognises that there may be different codes of practice for different broadcasters. At present there is a Code of Broadcasting Practice for free-to-air television and one for pay television. This is difficult to reconcile bearing

¹¹⁰ See n 18, 9.

¹¹¹ See n 106, 4.

in mind that the legislative standard under section 4(1)(a) applies to all broadcasters. The ability to have an appropriate code of practice does not extend under current legislation to being able to screen programmes which contravene the standard. An alternative argument is that the standard that applies is *for that group of subscribers* but this does seem to stretch the ordinary meaning of good taste and decency to a point not contemplated by the legislation.

The two systems do not sit well together and there is scope for them to be rationalised to the extent practicable.

V THE BALANCE BETWEEN FREEDOM OF EXPRESSION AND FREEDOM FROM HARM

The Act can also be seen in terms of the balance between the freedom of expression and the freedom from harm.

A *International Instruments and Selected Countries*

International instruments and the laws of democratic societies promote the concept of freedom of expression. However, this freedom is not absolute. Many expressions of freedom of expression are limited by behaving in a moral way.

1 *International instruments*

Article 19 of the Universal Declaration of Human Rights reads:¹¹²

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

However this is limited by article 29 (2) which reads:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 19(1) and (2) of the International Covenant on Civil and Political Rights, which gives effect to the Universal Declaration, is similarly worded and similarly limited by article 19(3).¹¹³

¹¹² *Year Book of the United Nations 1948-49* (Department of Public Information, United Nations, New York). New Zealand was one of the countries that adopted the Declaration in 1948.

¹¹³ See n 23.

2 Selected Countries

(a) Canada

Article 2(b) of the Canadian Charter of Rights and Freedoms says that everyone has “..... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”. This is comparable to section 14 of the NZ Bill of Rights Act and article 19(2) of the Covenant.

Article 1 which limits article 2(b) reads:¹¹⁴

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This is the same wording as section 5 of the NZ Bill of Rights Act and is comparable to article 19(3) of the Covenant.

The 1992 Canadian Supreme Court case of *R v Butler*¹¹⁵ confirmed that obscenity is a protected form of expression under the Canadian Charter and that section 163 of the Canadian Criminal Code which made it an offence to deal with obscene material violated the Charter.¹¹⁶ However, the Court ruled that section 163 was constitutional, ie was a justifiable limit on freedom of expression, despite it violating

Article 19(2) reads:

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

Article 19(3) reads:

“The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.”

¹¹⁴ See n 26. The Canadian Charter of Rights and Freedoms is supreme law. See art 52.

¹¹⁵ See n 27.

¹¹⁶ See n 27, 473.

the Charter. Although obscenity is protected Sopinka J said ¹¹⁷ that the kinds of things that underlie the protection of freedom of expression such as the search for truth do not include obscenity and that the fact that pornography is produced for economic profit supports this conclusion. However, unlike *Miller* (discussed shortly), he did not go so far as to say that obscenity was not protected. His line of thinking was directed at the reasons why obscenity as an expression should be restricted.

He also rejected the argument that legislation banning obscene material should not exist and that it would be more effective to use such methods as education and legislation against discrimination on the grounds of sex.¹¹⁸ He said that education and legislation are not alternatives but complements in addressing such problems.

(b) *United States*

Even in the United States of America where the First Amendment¹¹⁹ states that "Congress shall make no law"¹²⁰ "..... abridging the freedom of speech, or of the press"¹²¹ the courts have held that the First Amendment does not protect obscenity (although it does protect serious works). The leading case on this is still the 1973 Supreme Court case of *Miller v State of California*.¹²² In that case the defendant was prosecuted under the California Penal Code for mailing

¹¹⁷ See n 27, 481.

¹¹⁸ See n 27, 487.

¹¹⁹ This was proposed by the First Congress on 25 September 1789 to the legislatures of the several states. See JE Novak and RD Rotunda *Constitutional Law* (4 ed, West Publishing Company, Minnesota, 1991) 1277. The United States Constitution is supreme law.

¹²⁰ United States Code Annotated, Constitution of the US Annotated Amendment 1 to 3, Annotations from Federal and State Courts (West Publishing Co., St. Paul, Minn., 1987) 7.

¹²¹ See n 120, 176.

¹²² See n 36.

unsolicited obscene material, ie obscene material which dealt with sex.¹²³ It was held that the First Amendment did not protect (ie did not override) that part of the Code, ie that the state could regulate the distribution of obscene material. Expression must have value for it to be protected.¹²⁴

There are some often referred to United States obscenity cases. In 1957 the Supreme Court held that the First Amendment does not protect obscenity and that the state could therefore regulate obscene material.¹²⁵ This was the first case presented to the Supreme Court that challenged obscenity on First Amendment grounds and *Miller* followed it and added the notion of merit.¹²⁶ In 1969 the Supreme Court held that although the First Amendment does not protect obscenity it does protect the right of an individual to possess obscene material for private use, ie the state could not regulate obscene material for private use.¹²⁷ However, in 1973 the Supreme Court held that the state could regulate obscene shows at adult theatres.¹²⁸ In other words, it could prevent adults who consented to viewing those shows from viewing them. There was a public nuisance aspect to this. In 1978 the Supreme Court held the the Federal Communications Commission could prohibit the broadcast of indecent material.¹²⁹ This was on the basis of the pervasiveness of broadcast material which could be viewed by children.

¹²³ See n 36, 430-431.

¹²⁴ "..... to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conceptions of the First Amendment". *Miller v United States* 37 L Ed 2d 419, 437.

¹²⁵ *Roth v United States* 354 US 476 (1957).

¹²⁶ See n 36.

¹²⁷ *Stanley v Georgia* 394 US 557 (1969).

¹²⁸ *Paris Adult Theatre v Slaton* 413 US 49 (1973).

¹²⁹ See n 104.

(c) *New Zealand*

Section 14 of the NZ Bill of Rights Act is modelled on article 19(2) of the Covenant. Section 5 of the NZ Bill of Rights Act limits section 14.¹³⁰

B *The Influence of the New Zealand Bill of Rights Act 1990 on the Act*

The New Zealand Bill of Rights Act and its right to freedom of expression under section 14 does not override legislation and therefore does not override the Films, Videos, and Publications Classification Act when the intention of that Act is clearly stated.

Unlike in the United States, the subject matter that comes before the Office of Film and Literature Classification is "expression" and the Act can therefore be considered in the context of a restriction on freedom of expression. It is in this international and national context of freedom of expression not being absolute, ie limited by what is loosely called morality, that the Films, Videos, and Publications Classification Act 1993 was enacted.

¹³⁰ Section 14 reads:

"Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

Section 5 reads:

"Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Section 4 (paraphrased) says that the NZ Bill of Rights Act does not override other legislation, ie the NZ Bill of Rights Act is not supreme law.

Section 6 (paraphrased) says that if legislation can be given a meaning consistent with the NZ Bill of Rights Act then that meaning is to be preferred.

1 *No influence if classification decisions are based on the Act*

Since the New Zealand Bill of Rights Act 1990 is not supreme law, its application to the Act will be at the classification decision stage.

If a person argues that section 14 of the NZ Bill of Rights Act applies to a classification decision, the Chief Censor must establish¹³¹ 3 matters under section 5:

- The limit as imposed by the classification decision is reasonable.
- The limit is prescribed by law.
- The limit is demonstrably justified in a free and democratic society.

W. Hastings concludes that a classification decision is:¹³²

- Reasonable if it is no wider than is necessary. (This appears to equate with the concept of minimal impairment as discussed in *Butler* and discussed shortly.)
- Prescribed by law if it is based on statutory criteria (as outlined in section 3) and not guidelines. This is discussed in *Butler*.
- Demonstrably justified in a free and democratic society if it relates to morality (because, as previously outlined, most free and democratic societies restrict material which is contrary to public morality). (This appears to equate with the concept of "pressing and substantial" again discussed in *Butler*.)

He concludes overall that in these circumstances it will be difficult to challenge a classification decision through the Court on the basis of the NZ Bill of Rights Act.

¹³¹ *R v Oakes* (1986) 26 DLR (4th) 200, 225. "The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation." This is a decision of the Supreme Court of Canada.

¹³² WK Hastings "The New Zealand Bill of Rights and Censorship" (1990) NZLJ 384, 387.

A point to add is that if a classification decision could have gone either way then section 6 of the NZ Bill of Rights Act would apply to override the decision.

One of the issues considered in *Butler*¹³³ was whether a section of the *Criminal Code* of Canada which made it an offence for persons to deal with obscene publications was demonstrably justified under the Charter as a reasonable limit prescribed by law. Despite the fact that that case dealt with whether legislation (the *Code*) was constitutional in terms of the Charter, an issue which does not arise in New Zealand, and also was only concerned with material of a sexual nature due to the wording of the *Code*, the reasons relating to the interpretation of article 1 of the Charter can be applied to decisions made under the Films, Videos, and Publications Classification Act 1993. This decision extends Hastings's analysis in that it adds "rational connection" and "balance".

(a) ***Prescribed by law***

Sopinka J in *Butler*¹³⁴ said that the test was whether the legislation provided "an intelligible standard according to which the judiciary must do its work". Because the question of constitutionality of legislation does not arise in New Zealand, the test of prescribed by law, as Hastings¹³⁵ points out, can be adapted to whether the censorship decision is based on the statutory criteria. This seems to reduce to whether the judgment of the Office of Film and Literature Classification was exercised correctly.

¹³³ See n 27.

¹³⁴ See n 27, 475 following *Irwin Toy Ltd. v Quebec (Attorney-General)* (1989) 58 DLR (4th) 577.

¹³⁵ See n 132.

(b) *Reasonable and demonstrably justified*

In discussing whether a limit (ie a restriction) is reasonable and demonstrably justified in a free and democratic society Sopinka J followed a 2 part test. This involved reading “reasonably” and “demonstrably” together.

- **Part I** of the test is whether there is a pressing and substantial objective to justify overriding the freedom. In this case the objective was the avoidance of harm.
- **Part II** of the test is whether the limit taken to override the freedom is proportional to the objective. Part II of the test has 3 parts:
 1. Whether there is a rational connection between the limit and the objective.
 2. Whether the limit minimally impairs the right or freedom.
 3. Whether there is a balance between the effects of the limit and the objective. (Perhaps this could be alternatively expressed as to whether the benefits of the objective justify the costs of the limits.)

Part I of the test is that the limit must be of sufficient importance (ie have a pressing and substantial objective) to justify overriding the freedom. Sopinka J said:

- The purpose of section 163 of the Canadian Criminal Code was avoidance of harm to society (ie harm being antisocial attitudinal changes caused by exposure to obscene material¹³⁶). His view that the objective of the relevant section of the Criminal Code was the avoidance of harm was not considered in the lower court.
- The avoidance of this harm by restricting obscene material was a pressing and substantial concern.

His reasons for saying that the avoidance of harm by restricting obscene material was a pressing and substantial concern were:

¹³⁶ See n 27, 478.

- The Supreme Court had previously recognised in its prevention of hate literature that certain materials cause harm by offending the values fundamental to society and that this harm is a substantial concern which justifies restricting the otherwise full exercise of the freedom of expression.¹³⁷ Gonthier J later expanded this¹³⁸ saying that it is not a restriction based merely on like or dislike but based on some concrete problem such as life or harm.
- That legislation that suppresses obscenity is found in most free and democratic societies.
- That the legislation was consistent with Canada's international obligations ie the *Agreement for the Suppression of the Circulation of Obscene Publications*¹³⁹ and the *Convention for the Suppression of the Circulation of and Traffic in Obscene Publications*.¹⁴⁰
- That the increase in pornography renders the concern even more pressing and substantial than when the legislation was first enacted.

His analysis supports the basis for the New Zealand Act (avoidance of harm being a pressing and substantial concern, consistent with the approach taken in other democratic societies and with international obligations, and addressing the concerns expressed about the worsening excesses of pornography¹⁴¹).

His analysis also supports the basis for classification decisions based on that Act in that if a classification decision is based on the statutory criteria (applying community standards of what is harmful) then it cannot be overturned on that part of the test.

Again, this is a question of judgment.

¹³⁷ See n 27, 479.

¹³⁸ See n 27, 498.

¹³⁹ Also in force for New Zealand (from 14 October 1950): NZTS 1950 No. 4, A.15.

¹⁴⁰ Also in force for New Zealand (from 28 October 1948): NZTS 1948 No. 15, A.10.

¹⁴¹ See n 8.

Gonthier J added¹⁴² that comprised in the phrase "pressing and substantial" is the need for a wide consensus among holders of different conceptions of good as to what is not good.

As to the 3 aspects of **part 2** of the test (proportionality), he analysed¹⁴³ **rational connection** in terms of proof and concluded that although it is not possible to prove the connection between exposure to pornographic images and changes in attitudes, it is reasonable to presume that there is a connection. What he is saying is that the risk of harm to society is what society reasonably perceives to be the risk of harm. In support of proof not being required he cited the United States Supreme Court case of *Paris Adult Theatre I v Slaton*.¹⁴⁴ His conclusion that proof is not required is the same as in *Gordon v Gotch*¹⁴⁵ although the reasons are different. He does not rely on the distinction between legislative and adjudicative facts but on society's reasonable perception of the risk of harm. Essentially this comes down to the same thing because the Office of Film and Literature Classification in making its judgment must assess what society reasonably perceives to be the risk of harm.

It is interesting that section 4 of the Act can be seen as dealing with the rational connection part of the test. Again, applying the principles in the case to the New Zealand situation, it comes down to classification decisions being based on the statutory criteria applying community standards.

He analysed **minimal impairment** in relation to the legislation not restricting sexually explicit erotica¹⁴⁶ without violence that is not degrading or dehumanising

¹⁴² See n 27, 498.

¹⁴³ See n 27, 482-484.

¹⁴⁴ See n 128, 60-61.

¹⁴⁵ See n 53.

¹⁴⁶ See n 71, 15 which referred to the Canadian case of *R v Wagner* in which erotica was defined as "positive and affectionate human sexual interaction between consenting individuals participating on the

(which as previously outlined is also the case with the New Zealand Act). Again this reduces to what society reasonably perceives to be the risk of harm. Gonthier J, who agreed with Sopinka J's analysis, expanded this and said that the impact of the medium can be relevant to this point. It is likely that if a classification decision classified sexually explicit material *per se* between adults as objectionable then it would be wider than necessary and contravene the New Zealand Bill of Rights Act 1990. However, as stated earlier, such material is likely in New Zealand to be classified as objectionable except if restricted to persons who have attained the age of 18 years.

He also analysed it in relation to the defence of merit allowed by the Canadian legislation (merit is something that must be considered in section 3(4)(c) of the New Zealand Act although it is not stated to be a defence).

He also analysed it in relation to the Canadian legislation not defining obscenity more precisely. He said:¹⁴⁷

It seems that the only practicable alternative is to strive towards a more abstract definition of obscenity which is contextually sensitive and responsive to progress in the knowledge and understanding of the phenomenon to which the legislation is directed.

This is the approach which the New Zealand legislation takes. It avoids the "shopping list" approach which does not change with time and which may catch items which ought not to be caught. It focuses on context.

This analysis of minimal impairment supports Hasting's¹⁴⁸ point about a decision being no wider than is necessary.

participating on the basis of equality". However, this element of affection appears to impose a subjective view of what sexuality should be. Possibly Sopinka J was using the term merely to distinguish harmful pornography from harmless (ie non exploitative) pornography.

¹⁴⁷ See n 27, 485.

¹⁴⁸ See n 132.

He assessed the *balance between the effects of the limiting measures and the legislative objective* (the legislative objective being the avoidance of harm) as being the greater the intrusion, the more important the objective needs to be. He analysed it in terms of pornographic expression not being the kind of expression which the Charter seeks to protect which is the search for truth, participation in the political process and individual self-fulfilment and that the objective of the legislation is of fundamental importance in a free and democratic society.¹⁴⁹ See the discussion under limits on freedom of expression (Canada) earlier in this paper. Again, this supports Hastings point (which was based on international obligations and how other countries treat expression contrary to morality) that freedom of expression does not include the freedom to express matters contrary to morality, morality in these circumstances being more than dislike, but what is harmful. This seems to indicate that pornographic expression because of its lesser value can be intruded upon to a greater extent, and gets back to merit.

He concluded for the above reasons that the legislation was a reasonable limit on on freedom of expression.

New Zealand case law: The 1992 New Zealand Court of Appeal decision *Ministry of Transport v Noort*¹⁵⁰ was concerned with the consistency between the breath/blood test provisions of the Transport Act 1962 and the right to consult a lawyer under the New Zealand Bill of Rights Act 1990. The convictions were quashed because the defendants had not been told of their right to consult a lawyer. The Court dealt with how sections 4, 5 and 6 of the New Zealand Bill of Rights Act 1990 related to each other but the 5 judges used three different approaches. However, all three approaches adapted the right conferred by the New Zealand Bill of Rights Act 1990 to the enactment (the Transport Act) so that the objective of the

¹⁴⁹ See n 27, 481.

¹⁵⁰ [1992] 3 NZLR 260.

enactment would not be interfered with. In other words, the same conclusion was reached by different reasoning. In limiting the freedom, the Court was concerned with what was reasonable in the circumstances. This goes back to section 5 of the New Zealand Bill of Rights Act with rights being subject to reasonable limits and this in turn gets back to the 2 part test used in *Butler* which Richardson J supported.¹⁵¹ Although the Court of Appeal did not refer to *Butler* (the Supreme Court case of *Butler* is dated 2 months before *Noort*) Richardson J approved of another Canadian case that used the same test.

Richardson J said:¹⁵² that it was a matter of weighing:

- (1) the significance in the particular case of the values underlying the Bill of Rights Act;
- (2) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;
- (3) the limits sought to be placed on the application of the Act provision in the particular case; and
- (4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.

It is not clear how these matters to be weighed translate to the Canadian criteria. However in both cases it could be said that it comes down to the freedom on the one end of the seesaw, the objective on the other, and the limit balancing the two by reason of the limit's minimal impairment of the freedom on the one hand and the limit's rational connection to the objective on the other.

There appears to be support for the view that if a classification decision is based on the criteria of the Act, ie that the nature of the publication clearly warrants the decision, then the NZ Bill of Rights Act will not be effective in overturning it. In other words, the interpretation of the Act in terms of a Bill of Rights analysis does not impose a more liberal interpretation on the Act. However, what it does add is a

¹⁵¹ See n 150, 283 per Richardson J.

¹⁵² See n 150, 283.

necessary focus on the part of decision makers on the rights of persons submitting a publication, and that censorship must not be excessive. Section 38(2)(a) of the Act supports that focus by requiring the Office of Film and Literature Classification to specify the reasons for its decision. If there is doubt about the classification of a publication, then section 6 of the Bill of Rights Act would appear to apply for a decision to be made that favours the submitter of the publication.

The case of *Re Penthouse*¹⁵³ is of interest because it held that an age restriction on publications containing sexually explicit material was a justified limit on freedom of expression under section 5 of the New Zealand Bill of Rights Act, having regard to community standards.

Unproved harm can justify restrictions on the freedom of expression.

The above analysis indicates that the debate is about the balance between expression and harm, and not between expression and discrimination (two substantive rights in the New Zealand Bill of Rights Act 1990). Discrimination is built into harm in the Films, Videos, and Publications Classification Act 1993.

2 *The influence of international bodies - the possession offence*

(a) *Significance for section 131 of objectionable under section 3*

Under section 3(2) of the Act which deems certain publications to be objectionable, a publication does not have to be classified as objectionable for it to be objectionable. However, the Court under section 29 of the Act would require the evidence of the Chief Censor as to whether the publication was objectionable. An unclassified publication would therefore need to be examined and classified before the Court would accept it as objectionable.

¹⁵³ See n 25.

(b) *Possession for a purpose not required*

Section 131 of the Act caused much discussion as the Bill was being debated.¹⁵⁴

There was no possession offence under the repealed legislation. This meant that publications such as child pornography could be kept so long as they were not circulated. Under section 131(1), mere possession of an objectionable publication without any purpose is enough to establish an offence against the Act. Section 163 of the Canadian Criminal Code has a possession offence but possession must be for the purpose of disseminating the material, eg publishing it. This is equivalent to section 123 of the Act. Section 163 does not extend to private viewing of obscene materials.

Sopinka J¹⁵⁵ rejected the argument that harm could be avoided by placing restrictions on access to obscene material. His reason was that the legislature has determined that certain acts are harmful and it would be hypocritical to say that restrictions on access would lessen the harm. However, the section of the Code seems to be inconsistent with Sopinka's view in that it is aimed only at dissemination of obscene materials and allows private viewing. One would think that if material was found to be harmful to society then being viewed by one person would still be harmful to society. On this aspect the New Zealand legislation differs from the Canadian legislation. In New Zealand, if a publication is objectionable (without restrictions) then it cannot be possessed for private viewing. The legislation catches not only the distributor, but also the consumer. This seems logical. Without consumers, distribution has no commercial purpose. Furthermore, if a publication is harmful to society then there is a risk that by allowing the owner to view it, that person's changed attitudes may harm society. Section 131 takes this view.¹⁵⁶

¹⁵⁴ See for example, NZPD vol 532, 2 December 1992, 12765.

¹⁵⁵ See n 27, 486-487.

¹⁵⁶ Under section 23(2)(c)(iii) of the Act it is possible for a publication to be restricted to one person. However, this appears to be qualified by section 23(3) which requires that publications limited to specified

(c) *Lack of knowledge not a defence*

Section 131(3) says that lack of knowledge or lack of reasonable cause to believe that the publication was objectionable is not a defence. Lack of knowledge is also not a defence under sections 123(3), 125(3), 127(3), 129(2) and 130(3).

(d) *Significance of reporting to international bodies*

Although, as previously outlined, it is unlikely that the New Zealand Bill of Rights will have little influence on classification decisions that are made in accordance with the statutory criteria, New Zealand's requirement to report to the United Nations Human Rights Committee may influence the legislation itself. In its Third Report to the Committee¹⁵⁷ New Zealand reported that the Attorney-General had reported¹⁵⁸ that the provision would be inconsistent with section 26 of the New Zealand Bill of Rights Act 1990 (which says that retrospective criminal liability shall not be imposed and which reflects article 15 of the Covenant), and that the provision could not be justified under section 5 of the Bill of Rights Act, but that Parliament decided to enact the provision. The section is retrospective because at the time of the charging with an offence, the classification decision would not have been made. Parliament decided to enact the provision because of the concern that child pornography was often found in the possession of child molesters, and also that in targeting the consumer the market for production of such material might dry up. The Committee responded¹⁵⁹ by expressing its concern over the vagueness of "objectionable" and

persons be for educational, professional, scientific, literary, artistic, or technical purposes". If this is so, then objectionable publications cannot be limited to specified persons for their own use unless the use is one of the uses mentioned.

¹⁵⁷ See n 87.

¹⁵⁸ NZPD vol 532, 12757 - 12779, 2 December 1992, 12764 - 12765.

¹⁵⁹ See n 87, 69 - 70. *Report to Human Rights Committee*. The Committee considered the third periodic report of New Zealand at its 1393rd to 1395th meetings (CCPR/C/SR. 1393 to SR. 1395) held on 23 and 24 March 1995.

that section 131¹⁶⁰ made possession a criminal offence without knowledge. It suggested that "objectionable" be made more specific, or that criminal liability for possession without knowledge be removed.

New Zealand will reply to these comments and will no doubt explain the meaning of "objectionable". Change to "objectionable" is highly unlikely, because the test is repeated from previous law and also, as argued in this paper, has a sound basis. Change to the Act, if any, will be to section 131. A likely argument against change will be that the offence is not one of absolute liability where the defendant is convicted regardless of their state of mind but of strict liability in that the onus of proof is reversed from the prosecution to the defendant in that the defendant is only convicted if they cannot prove on the balance of probabilities they are not at fault. For example, if the defendant proves that the publication was "planted" in their house and they did not know of its existence then they would not be convicted. This is different from not having knowledge of the nature of the publication. This is consistent with section 131(6) which indicates that a defendant may have a defence.

Section 25(c) of the New Zealand Bill of Rights Act 1990 states that a defendant has the right to be presumed innocent until proved guilty. Section 131, based on the previous argument, appears to be clear that the reverse onus applies and therefore section 4 of the Bill of Rights Act applies to override section 25(c).

Section 131 assumes that people who know that a publication is in their possession should know what is objectionable. Only the most extreme material is deemed to be objectionable and based on the concept of community standards, the average person would know if such material was objectionable and therefore further notice is not

¹⁶⁰ See n 87, 69. *Report to Human Rights Committee* Section 131 is incorrectly referred to as section 121.

required.¹⁶¹ However, whether a publication is objectionable is not necessarily clear cut, as evidenced by the fact that an expert body is needed to make a classification decision. The decision can be difficult to make and unpredictable, and can be overturned. Nevertheless it could be said that the purpose of the section (the protection of children) outweighs this disadvantage.¹⁶²

Petition to United Nations Human Rights Committee: If a person felt aggrieved about their treatment under domestic law in relation to an offence under section 131 they could petition the United Nations Human Rights Committee (under the Optional Protocol to the International Covenant on Civil and Political Rights¹⁶³) about the violation of their civil and political rights. The balance of freedoms in this regard could possibly swing towards the liberal view expressed in *Stanley v Georgia*.¹⁶⁴

¹⁶¹ See Stewart J in the United States Supreme Court case of *Jacobellis v Ohio* 378 US 184, 197 (1968) who said that he couldn't define pornography "But I know it when I see it". Referred to in n?????????? *Constitutional Law* 1140.

¹⁶² See n 59, 52 which recommended that mere possession of refused classification material should not be an offence but that possession of child pornography should be because of its association with sex abuse. *Aust Law Reform Commission Report*

¹⁶³ NZTS 1989, No. 12, A. 103. In force for New Zealand 26 August 1989.

¹⁶⁴ See n 127. See also art 12 Universal Declaration of Human Rights and art 17 International Covenant on Civil and Political Rights, both of which relate to unlawful interference with privacy or with the home.

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APPENDIX

SECTION 2 FILMS, VIDEOS, AND PUBLICATIONS CLASSIFICATION ACT 1993: "Publication"

2. Interpretation

"Publication" means-

- (a) Any film, book, sound recording, picture, newspaper, photograph, photographic negative, photographic plate, or photographic slide;
- (b) Any print or writing;
- (c) Any paper or other thing-
 - (i) That has printed or impressed upon it, or otherwise shown upon it, any word, statement, sign, or representation; or
 - (ii) On which is recorded or stored any information that, by the use of any computer or other electronic device, is capable of being reproduced or shown as any word, statement, sign, or representation:

SECTION 3 FILMS, VIDEOS, AND PUBLICATIONS CLASSIFICATION ACT 1993: "Objectionable"

3. Meaning of "objectionable" - (1) For the purposes of this Act, a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.

(2) A publication shall be deemed to be objectionable for the purposes of this Act if the publication promotes or supports, or tends to promote or support, -

- (a) The exploitation of children, or young persons, or both, for sexual purposes; or
- (b) The use of violence or coercion to compel any person to participate in, or submit to, sexual conduct; or
- (c) Sexual conduct with or upon the body of a dead person; or
- (d) The use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct; or
- (e) Bestiality; or
- (f) Acts of torture or the infliction of extreme violence or extreme cruelty.

(3) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or should be given a classification other than objectionable, particular weight shall be given to the extent and degree to which, and the manner in which, the publication -

- (a) Describes, depicts, or otherwise deals with-
 - (i) Acts of torture, the infliction of serious physical harm, or acts of significant cruelty:
 - (ii) Sexual violence or sexual coercion, or violence or coercion in association with sexual conduct:
 - (iii) Other sexual or physical conduct of a degrading or dehumanising or demeaning nature:
 - (iv) Sexual conduct with or by children, or young persons, or both:
 - (v) Physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain:
 - (b) Exploits the nudity of children, or young persons, or both:
 - (c) Degrades or dehumanises or demeans any person:
 - (d) Promotes or encourages criminal acts or acts of terrorism:
 - (e) Represents (whether directly or by implication) that members or any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993.
- (4) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or should be given a classification other than objectionable, the following matters shall also be considered:
- (a) The dominant effect of the publication as a whole:
 - (b) The impact of the medium in which the publication is presented:
 - (c) The character of the publication, including any merit, value, or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific, or other matters:
 - (d) The persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available:
 - (e) The purpose for which the publication is intended to be used:
 - (f) Any other relevant circumstances relating to the intended or likely use of the publication.

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